Tentative Rulings for November 29, 2016
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

11CECG03076 ***Lee v. Ibarra*** **(Dept. 402)**

14CECG01830 ***Gateway Business Bank v. Leist*** **(Dept. 502)**

12CECG00047 ***Seriman v. Brown*** **(Dept. 502)**

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

03

Tentative Ruling

Re: ***Clausell v. Lopopolo***
Case No. 16 CE CG 02496

Hearing Date: November 29th, 2016 (Dept. 402)

Motion: Defendant Roth's Motion for Further Monetary and/or Terminating Sanctions

Tentative Ruling:

To grant defendant Roth's motion for terminating sanctions against plaintiff Laniece Clausell for her willful refusal to comply with the court's order compelling her to respond to defendant's discovery. (Code Civ. Proc. §§ 2023.030; 2030.290, subd. (c); 2031.300, subd. (c).) Plaintiff's claims against Dr. Roth will be dismissed, with prejudice.

In addition, the court intends to impose further monetary sanctions of $460 against plaintiff to compensate defendant for the cost of bringing the present motion. Plaintiff shall pay sanctions within 30 days of the date of service of this order.

Explanation:

Once a motion to compel answers is granted, continued failure to respond or inadequate answers may result in more severe sanctions, including evidence, issue or terminating sanctions, or further monetary sanctions. (Code Civ. Proc. §§ 2030.290, subd. (c); 2031.300, subd. (c).) The court may strike out the offending party's pleadings or parts thereof, stay further proceedings by that party until the order is obeyed, dismiss that party's action, or render default judgment against that party. (Code Civ. Proc. § 2023.030(d).) However, sanctions for failure to comply with a court order are allowed only where the failure was willful. (*R.S. Creative, Inc. v. Creative Cotton, Ltd*. (1999) 75 Cal.App.4th 486, 495; *Vallbona v. Springer* (1996) 43 Cal.App.4th 1525, 1545; *Biles v. Exxon Mobil Corp*. (2004) 124 Cal.App.4th 1315, 1327.)

Here, plaintiff has completely failed to comply with the court's August 3rd, 2016 order compelling her to provide verified responses without objections to the form and special interrogatories, request for production of documents, and request for a statement of damages. The plaintiff was ordered to provide verified responses within 10 days of the date of service of the order, but so far she has not served any responses or paid monetary sanctions. It has now been three months since the court's order was issued, and over a year since defendant first served the discovery requests. The trial date is less than five months away. Yet so far, defendant has yet to receive even the most basic responses to his first set of discovery requests, including questions regarding the basis for his alleged liability and the nature and amount of plaintiff's damages. Obviously, defendant cannot go to trial without any information about plaintiff's case.

Also, plaintiff's counsel has made no effort to explain the failure to serve any responses or otherwise comply with the court's order. Defense counsel even sent a letter to plaintiff's counsel to request compliance with the order, but received no response. Nor has plaintiff filed any opposition to the present motion. Therefore, it appears that plaintiff's counsel has either stopped communicating with her client, or her client has completely given up on her case. In either event, there is no excuse for plaintiff's complete and apparently willful refusal to respond to discovery. In addition, it does not appear that further monetary sanctions would be sufficient to compel plaintiff to respond, since she has already been sanctioned previously, and she has not paid sanctions or provided any responses.

Consequently, the court intends to grant the motion for terminating sanctions and dismiss plaintiff's claims against Dr. Roth, with prejudice, for failure to comply with the court's order compelling her to respond to his discovery. The court also intends to impose further monetary sanctions of $460 against plaintiff to compensate defendant for the cost of bringing the present motion.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: JYH on 11/28/16
(Judge's Initials) (Date)

(2)

Tentative Ruling

Re: ***Eads et al. v. Gee***
Superior Court Number: 14CECG01736

Hearing Date: November 29, 2016 (Dept. 402)

Motion: Petitions to Compromise Minors' Claim

Tentative Ruling:

To grant. Order signed. Hearing off calendar.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 11/28/16
(Judge's Initials) (Date)

(30)

Tentative Ruling

Re: ***Daniel Gomez v. Montgomery's Auto Body, Inc.***
Superior Court No. 16CECG02715

Hearing Date: Tuesday, November 29, 2016 (**Dept. 402**)

Motion: Defendants' Motion to STAY

Tentative Ruling:

To **Stay** proceedings regarding Defendant Aaron Keith Montgomery in his individual capacity *only*.

Explanation:

The Court has authority to stay civil proceedings when the interests of justice require such action. (*People v. Coleman* (1975) 13 Cal.3d 867, 885; *Keating v. Office of Thrift Supervision* (9th Cir. 1995) 45 F.3d 322, 324.) When faced with parallel criminal proceedings, the analysis should be undertaken "in light of the particular circumstances and competing interests involved in the case." (*Keating, supra,* 45 F.3d at 324.) This means the Court should consider "the extent to which the defendant's fifth amendment rights are implicated." (*Ibid*.) In addition, the Court should generally consider the following factors:

> (1) the interest of the plaintiffs in proceeding expeditiously with this litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay;
>
> (2) the burden which any particular aspect of the proceedings may impose on defendants;
>
> (3) the convenience of the court in the management of its cases, and the efficient use of judicial resources;
>
> (4) the interests of persons not parties to the civil litigation; and
>
> (5) the interest of the public in the pending civil and criminal litigation. (*Id.* at 325.)

Pacers v. Superior Court (1984) 162 Cal.App.3d 686 involved individual Defendants in a civil action who were facing possible criminal prosecution based on the same facts. The Court imposed a stay. The ruling was consistent with federal practice. (see *Campbell v. Eastland* (5th Cir. 1962) 307 F.2d 478; *Perry v. McGuire* (S.D.N.Y. 1964) 36 F.R.D. 272; *Paul Harrigan & Sons, Inc. v. Enterprise Animal Oil Co., Inc*. (E.D.Pa. 1953) 14 F.R.D. 333; *National Discount Corp. v. Holzbaugh* (E.D.Mich. 1952) 13 F.R.D. 236.) The Court also weighed the parties' competing interests with a view toward accommodating both. (*Id.*

at 690.) Ultimately, Defendants' Fifth Amendment rights against self-incrimination outweighed Plaintiffs' objections based on inconvenience and delay. (*Ibid.*)

Avant! Corp. v. Superior Court (2000) 79 Cal.App.4th 876 involved a corporate Defendant in a civil action that was also involved in a related criminal case. The Court denied Defendant's request to stay civil proceedings *mainly* because corporations *unlike* individuals, have no privilege against self-incrimination. (*Id.* at 883.) And The Court noted that not having an agent, who could, without fear of self-incrimination, furnish the requested information, does not justify a stay. (*Id.* at 888.) The Court gave consideration to the *Keating* factors. (*Ibid.*)

Here, Defendants both seek a stay. Regarding Defendant Montgomery, he is an individual so *Pacers* controls. Regarding Defendant Montgomery Auto Body, Inc., it is a corporation so *Avant!* controls. Therefore, the most practical way to make a decision is to use the *Keating* factors as a framework to balance the interests. (see *Keating, supra,* 45 F.3d at 325.)

(1) The interest of the Plaintiff in proceeding and the potential prejudice of delay

Plaintiffs cite to *Avant!* where the Court notes the interests of plaintiffs *in general* to proceed expeditiously. (Opposition, filed 11/9/16 p5 lns 14-22.) Plaintiffs also argue that they need to proceed expeditiously because their case relies on percipient witnesses and because Plaintiff Daniel Gomez is 70 years old. (*Id.* at p8 lns 1-4.)

Regarding Defendant Montgomery: Inconvenience and delay do not outweigh the privilege against self-incrimination, so Plaintiffs *generic* argument about proceeding expeditiously is not convincing. (*Pacers, supra,* 162 Cal.App.3d at 690.) Plaintiffs' argument regarding percipient witnesses requires more facts before it can outweigh Defendant's burden (e.g. number of available witnesses and their particular circumstances). Further, Plaintiff Daniel Gomez's age is not compelling because age *alone* does not justify expeditious proceedings.

Regarding Defendant Montgomery Auto Body, Inc.: In the absence of opposition, this factor defaults to Plaintiffs. (*Avant!, supra,* 79 Cal.App.4th at 887.)

(2) The burden which the proceeding may place on Defendants

Plaintiffs acknowledge Defendant Montgomery's Fifth Amendment privilege, but cite to *Avant!* where the Court suggests having Defendants provide only non-privileged information to ameliorate their burden. (Opposition, filed 11-9-16 p5 lns 23-26.) Plaintiffs also point out that Defendant Montgomery Auto Body, Inc. has no privilege against self-incrimination. (*Id.* at p9.)

Defendant Montgomery argues that he "may have to sacrifice either his worldly possessions or his constitutional right under the 5th Amendment" if a stay is not imposed. (Motion filed 10/25/16 p6 lns 5-6.)

Defendant Montgomery Auto Body, Inc. argues that a stay should be imposed because Defendant Montgomery is the only person thorough whom "this entity can present a meaningful defense … [and] Mr. Montgomery will be unable to provide that assistance while the criminal matter is pending — at least not without waiving his Fifth Amendment rights." (*Id.* at p6 ln16 & lns20-22.)

Regarding Defendant Montgomery: Fifth Amendment conflict is the most compelling reason for Defendant Montgomery. (*Pacers, supra,* 162 Cal.App.3d at 690.) And ordering that he provide only non-privileged information is not in any way accommodating because Code of Civil Procedure section 2017.010 already limits discovery to non-privileged information.

Regarding Defendant Montgomery Auto Body, Inc.: A corporate defendant not having an agent who could, without fear of self-incrimination, furnish requested information is not grounds for a stay. (*Avant!, supra,* 79 Cal.App.4th at 888.)

(3) The convenience of the Court in the management of its cases and the efficient use of judicial resources

Plaintiffs cite to *Avant!* where the Court notes that generally, the convenience of the courts is best served "when motions to stay proceedings are discouraged." (Opposition, filed 11/9/16 p5 lns 27-28 & p6 lns 1-4; see *Avant!, supra,* 79 Cal.App.4th 876, quoting *U.S. v. Private Sanitation Industry Ass'n* (E.D.N.Y. 1992) 811 F.Supp. 802, 808 ["a policy of issuing stays 'solely because a litigant is defending simultaneous lawsuits would threaten to become a constant source of delay…"].) Plaintiffs also speculate regarding possible scenarios which could lead to substantial delays. (Opposition, filed 11/9/16 p8 lns 11-17.)

Defendants argues that a delay is unlikely as the Fresno County District Attorney's Office has already filed charges and he has already made his initial appearance in the criminal case. (Motion filed 10/25/16 Ex.A & p3 lns 1-4.)

Regarding Defendant Montgomery: Again, delay is not compelling. (*Pacers, supra,* 162 Cal.App.3d at 690.)

Regarding Defendant Montgomery Auto Body, Inc.: Criminal prosecution is *already* underway, making indefinite or years-long continuances unlikely. Further, Plaintiffs' counter regarding possible scenarios is speculative and unsupported.

(4) The interests of third-parties to the civil action

Neither party addresses this factor. (Opposition, filed 11/9/16 p6 lns 5-6.)

(5) The interest of the public in the pending civil and criminal litigation

Plaintiffs cite to *Avant!* where the Court notes that the public has an interest in a system that encourages settlement of disputes. (Opposition, filed 11/9/16 p6 lns 7-10.)

Regarding Defendant Montgomery: Irrelevant *because only* the parties' competing interests are considered. (*Pacers*, *supra,* 162 Cal.App.3d at 690.)

Regarding Defendant Montgomery Auto Body, Inc.: *Again,* in the absence of opposition, this factor defaults to Plaintiffs. (*Avant!, supra,* 79 Cal.App.4th at 888.)

Ultimately, Plaintiffs' meager facts and objections regarding delay do not outweigh Defendant Montgomery's privilege against self-incrimination. Therefore, a stay of all proceedings is imposed on his behalf. On the other hand, Defendant Montgomery Auto Body, Inc. has not presented adequate facts to justify a stay; three out of five of the Keating factors favor Plaintiffs. Therefore, a stay is not imposed on its behalf.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: JYH on 11/28/16
(Judge's Initials) (Date)

Tentative Rulings for Department 403

(30)

Tentative Ruling

Re: ***Bryan Moon v. Sina Vong***
Superior Court Case No. 15CECG01871

Hearing Date: Tuesday November 29, 2016 (**Dept. 403**)

Motion: Petition to Compromise a Minor's Claim

Tentative Ruling:
To deny the petition, without prejudice. *Petitioner must file an amended petition, and obtain a new hearing date for consideration of the amended petition*. (Super. Ct. Fresno County, Local Rules, rule 2.8.4.)

Explanation:
The petition contains the following discrepancies and omissions:

1. Diagnosis
Paragraph 9 (a) of the Petition indicates Minor is fully recovered, but medical records do not substantiate this claim. (Pet., Attach 10.) On November 21, 2013, treating Chiropractor indicated that Minor's progress was "static" and that he had "reached maximum medical improvement." (*Ibid.*) But This Court requires evidence that Minor is fully recovered. Further, since Minor was treated for anxiety (Pet. ¶ 8), medical records must be attached indicating that he has fully recovered from this condition as well.

2. Policy Limits
Alma Ruiz Pranger received significantly more than Minor, $50,000. (Petition, ¶ 12.) This indicates either a vast disparity in injuries or that policy limits affected Minor's settlement. Therefore, This Court requires policy limit information and the accident report.

3. Medical Bills
Paragraph 13(5)(b)(i) indicates that the Community Medical Centers' lien was reduced by $579.32, so the "Amount to be paid from proceeds of settlement or judgment" should equal $1,173.68 *not* $1,753. (Pet. ¶ 13(5)(b)(i)(F).)

4. Attorney's Fees
Here, Attorney requests $ 2,750, representing 25% of the gross recovery. (Attorney Dec, filed 10/11/16 ¶ 1.) He states that he performed investigation, assisted with medical treatment, collected medical records and settled the case. (*Ibid*.) But no billable hours related to the case are provided, and he expects to receive $20,000 from Alma Ruiz Pranger. (Pet. ¶ 18 (f).) This equates to 57 hours, which is more than enough to settle both claims, especially since Mr. Torem has 23 years'

experience. (Attorney Dec, filed 10/11/16 ¶ 1.) Nonetheless, because This Court typically awards 25% of the net recovery in fees, Counsel must reduce request to $1,719.40.

5. Order
Paragraph 7 (c)(c)(i) of the Order indicates that Community Medical Centers is to receive $1,753. This conflicts with Paragraph 13 (5)(b)(i) of the Petition, which indicates that the Community Medical Centers' lien was reduced by $579.32. As such, the total does not equate to $4,122.42 *as asserted.* (Order, ¶ 7 (c) & Attach 7c(1)(c).)

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: KCK on 11/28/16
(Judge's Initials) (Date)

Tentative Rulings for Department 501

Tentative Rulings for Department 502

(6)

Tentative Ruling

Re: ***Cruz v. Casa De Rosas Apartments***
Superior Court Case No.: 16CECG02567

Hearing Date: November 29, 2016 (**Dept. 502**)

Motion: Demurrer by Defendants 81 Casa De Rosa Apartments, LP, Leah Martin, and D&K Management, Inc.

Tentative Ruling:

To take the hearing off calendar, because Defendants did not comply with Code of Civil Procedure section 430.41 before filing the demurrer.

Before filing any new demurrer, Defendants must fully comply with Code of Civil Procedure section 430.41. Any new hearing date must be obtained pursuant to The Superior Court of Fresno County, Local Rules, rule 2.2.1.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 11/23/16
(Judge's Initials) (Date)

(29)

Tentative Ruling

Re: ***Patrick Linehan v. Wells Fargo Bank, N.A., et al.***
Superior Court Case No. 16CECG02608

Hearing Date: November 29, 2016 (Dept. 502)

Motion: Demurrer

Tentative Ruling:

To sustain, with leave to amend.

Explanation:

A general demurrer for failure to state a cause of action asks the court to consider whether all essential elements of each cause of action have been alleged. (Code Civ. Proc. §430.10(e).) "Although California courts take a liberal view of inartfully drawn complaints, "[i]t remains essential ... that a complaint set forth the actionable facts relied upon with sufficient precision to inform the defendant of what plaintiff is complaining, and what remedies are being sought." (*Signal Hill Aviation Co. v. Stroppe* (1979) 96 Cal.App.3d 627, 636.)

Courts exercise great liberality in allowing amendments to a complaint so that no litigant is deprived of its day in court due to "mere technicalities of pleading. [Citation.]" (*Saari v. Superior Court* (1960) 178 Cal.App.2d 175, 178; see also *Cabral v. Soares* (2007) 157 Cal.App.4th 1234, 1240 ["Only rarely should a demurrer to an initial complaint be sustained without leave to amend."].)

Cumulative pleading, i.e., the practice of incorporating all or most prior paragraphs within each cause of action, sometimes referred to as "chain letter pleading," tends to cause ambiguity and create redundancy, and is thus disfavored. (*Uhrich v. State Farm Fire & Cas. Co.* (2003) 109 Cal.App.4th 598, 605; *Kelly v. General Telephone Co*. (1982) 136 Cal.App.3d 278, 285 ["[Chain letter] pleading should be avoided[.]"].)

Plaintiff here incorporates into each cause of action, every preceding paragraph, and then recites boilerplate law. The complaint thus incorporates between 40 and 109 paragraphs into each cause of action. Plaintiff's use of chain letter pleading makes it impossible for the Court to determine which facts Plaintiff intends to allege in which causes of action. Accordingly, Defendant's demurrer is sustained, with leave to amend.

Judicial notice is taken as requested by Defendant.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: _____DSB_____ on 11/23/16

(Judge's Initials) (Date)

(29) **Tentative Ruling**

Re: ***Arnoldo & Teresa Lua, et al. v. H/S Development Company, LLC, et al. and related cross-actions***
Court Case No. 14CECG02057

Hearing Date: November 29, 2016 (Dept. 502)

Motion: Defendant-in-Intervention Sacramento Insulation Contractors dba Sacramento Building Product's demurrer to Travelers Indemnity Company of Connecticut's Complaint-in-Intervention

Tentative Ruling:

To take off calendar for failure to comply with Code of Civil Procedure section 430.41, subdivision (a). The demurrer was filed October 21, 2016, after the effective date of Code of Civil Procedure Section 430.41. The demurring party was required to file with the demurrer a declaration stating either the means by which the parties met and conferred and that the parties did not reach an agreement resolving the objections raised in the demurrer, or that the party who filed the pleading subject to demurrer failed to respond to the meet and confer request of the demurring party, or otherwise failed to meet and confer in good faith. (Code Civ. Proc. §430.41(a)(3).) No such declaration was filed. The parties are ordered to meet and confer pursuant to the statute and, if necessary, to calendar a new hearing date for a demurrer.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 11/23/16
(Judge's Initials) (Date)

(29)

Tentative Ruling

Re: ***BMO Harris Bank, N.A. v. Jasvir Gill, et al.***
Superior Court Case No. 16CECG03218

Hearing Date: November 29, 2016 (Dept. 502)

Motion: Writ of possession

Tentative Ruling:

To deny without prejudice.

Explanation:

Moving papers must be properly served. (Code Civ. Proc. §1005.) The Court's review of the file revealed no proof of service of the instant motion.

Even if service is shown, Plaintiff has not shown probable validity of its claims to the court's satisfaction. A writ of possession shall issue if both of the following are found: (1) plaintiff has established the probable validity of its claim to possession; and (2) the undertaking requirements of Code of Civil Procedure section 515.010 have been satisfied. (Code Civ. Proc. §512.060.)

In the case at bench, Plaintiff has provided copies of the agreements between Defendant Jasvir Gill and Plaintiff, and Defendant Gill and Plaintiff's assignor. Plaintiff has failed, however, to provide written proof of missed payments, i.e., there are no copies of bills or statements to support Plaintiff's assertion that Defendant Gill defaulted on the loans in question on the dates alleged. (See Decl. of Koepke, ¶¶ 9, 17, 31, 45.) Moreover, Plaintiff fails to support the alleged interest rates on the loans at issue. (See, e.g., id. at ¶¶ 10, 18, 33, 47; and Compl., ¶¶ 8, 20, 38, 43, 55.) Plaintiff fails to define the "repossession fees" listed in the loan damage calculator for loan number 7799327001. (Compl., Exh. 2.)

Because the moving party has not shown the probable validity of its claims, and because it does not appear that Defendant has been properly served, the application is denied without prejudice.

Pursuant to California Rules of Court, rule 3.1312, and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 11/23/16
(Judge's Initials) (Date)

(17) **Tentative Ruling**

Re: ***Garcia v. Suburban Propane, L.P.***
Court Case No. 16 CECG 00418

Hearing Date: November 29, 2016 (Dept. 502)

Motion: Plaintiff's Motion to Amend Class Action Complaint

Tentative Ruling:

To grant. Plaintiff may substitute Michell Fernandez in place of Sandra Garcia. Michell Fernandez may file a First Amended Complaint. All allegations in the First Amended Complaint that were not present in the original Complaint shall be in **bold** type font. The First Amended Complaint must be *filed and served* with 10 days of the clerk's service of this order.

Explanation:

"The court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading." (Code Civ. Proc. § 473; see also, § 576.) There is generally a strong policy in favor of allowing a plaintiff to amend the complaint. (*Glaser v. Meyers* (1982) 137 Cal.App.3d 770, 776-777.) Judicial policy favors resolution of all disputed matters between the parties in the same lawsuit. Thus, the court's discretion will usually be exercised liberally to allow amendment of the pleadings. (*Nestle v. Santa Monica* (1972) 6 Cal.3d 920, 939; *Mabie v. Hyatt* (1998) 61 Cal.App.4th 581, 596.)

A motion to amend must also comply with California Rule of Court rule 3.1324. Under this rule, a motion to amend must: (1) include a copy of the proposed amendment, (2) state what allegations in the previous pleading are proposed to be deleted, if any, and where, by page, paragraph, and line number, the deleted allegations are located, and (3) state what allegations are proposed to be added to the previous pleading, if any, and where, by page, paragraph, and line number, the additional allegations are located. (Cal. Rule of Court, Rule 3.1324, subd. (a).) Moreover, a separate declaration must accompany the motion which specifies: (1) the effect of the amendment, (2) why the amendment is necessary and proper, (3) when the facts giving rise to the amended allegations were discovered, and (4) the reasons why the request for amendment was not made earlier. (Cal. Rule of Court, Rule 3.1324, subd. (b).)

The motion is only loosely in compliance with rule 3.1324. The Proposed Amended Complaint does not highlight the new language in a bold type font. Nor does the Notice of Motion identify by page and line number the additions and deletions. Moreover, the declaration of Lenden Webb fails to thoroughly comply with California Rule of Court, rule 3.1324(b), items (1) and (4). However, because the complaint is short, the court can identify what is being changed, the court knows the

history of the case and motion, and the defendant has not opposed this motion, the court will grant the motion.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: DSB on 11/23/16
(Judge's Initials) (Date)

Tentative Rulings for Department 503

(24) **Tentative Ruling**

Re: ***Anderson v. The Bertelsman Living Trust***
Court Case No. 15CECG02629

Bertelsman Living Trust v. Anderson
Court Case No. 15CECL01652

Bertelsman Living Trust v. Anderson
Court Case No. 15CECL01655

Hearing Date: **November 29, 2016 (Dept. 503)**

Motion: Plaintiffs' Motion to Consolidate

Tentative Ruling:

To grant, consolidating for all purposes Case No. 15CECG02629, Case No. 15CECL01652, and Case No. 15CECL01655, with Case No. 15CECG02629 being designated as the master file. All further documents filed in the case shall be filed only in the lead case, and shall include the caption and case number of the lead case, followed by the case number of the other consolidated cases. (Cal. Rules of Court, Rule 3.350.)

Explanation:

When complex issues of title are involved, consolidation of an Unlawful Detainer action with an unlimited civil action is appropriate. (*Martin-Bragg v. Moore* (2013) 219 Cal.App.4th 367, 391; *Berry v. Society of St. Pius X* (1999) 69 Cal.App.4th 354, 364, *fn 7*; *Wilson v. Gentile* (1992) 8 Cal.App.4th 759, 761; *Mehr v. Superior Court* (1983) 139 Cal.App.3d 1044, 1049; *Asuncion v. Superior Court* (1980) 108 Cal.App.3d 141, 146.) While moving parties did not file the Notice of Motion in each of the cases, as required by California Rules of Court, Rule 3.350, subdivision (a)(1)(C), the motion was correctly captioned and it listed all named parties in each case, as required by Rule (subd. (a)(1)(A)-(B)), and defendants filed a notice of non-opposition. Therefore, the motion is granted despite this error.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Simpson on 11/28/16
(Judge's Initials) (Date)

(5)

Tentative Ruling

Re: ***Rudy Castro v. Sunset Waste Systems, Inc.***
Superior Court Case No. 16 CECG 01849

Hearing Date: November 29, 2016 **(Dept. 503)**

Motion: Demurrer to original Complaint

Tentative Ruling:

To grant the request for judicial notice pursuant to Evidence Code § 452(d)(1). To strike the original complaint sua sponte pursuant to CCP § 436 with leave to amend. An amended pleading in strict compliance with the ruling is to be filed within 15 days of notice of the ruling. Notice runs from the date that the Minute Order is served plus 5 days for service via mail. [CCP § 1013]

Explanation:

Representative Actions for Violations of the Labor Code

The California Labor and Workforce Development Agency (LWDA) is authorized to assess and collect civil penalties for *certain violations* of the Labor Code. Because the LWDA and its constituent departments and divisions are unable to prosecute employers for every Labor Code violation, the Legislature enacted the "Labor Code Private Attorneys General Act of 2004" **(PAGA)**, which allows employees to initiate a civil action against their employers. [See Lab.C. § 2698; *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 379; *Franco v. Athens Disposal Co., Inc*. (2009) 171 Cal.App.4th 1277, 1301] The aggrieved employee **generally retains only 25% of any civil penalty recovery**. The remaining 75% goes to the LWDA for education and enforcement purposes. [*Amalgamated Transit Union, Local 1756, AFL-CIO v. Sup.Ct. (First Transit, Inc.)* (2009) 46 Cal.4th 993]

PAGA does not limit the employee's right to pursue other remedies available under state or federal law "either separately or concurrently with an action taken under this part." [Lab.C. § 2699(g)(1); *Caliber Bodyworks, Inc. v. Sup.Ct. (Herrera)* (2005) 134 Cal.App.4th 365, 375] PAGA applies **only** to civil penalties previously enforceable only by the State's labor law enforcement agencies. It does not affect or apply to actions for statutory penalties recoverable directly by employees (e.g., Lab.C. § 203 "waiting time" penalties against employers who willfully fail to pay wages owed to terminated employees. [*Caliber Bodyworks, Inc. v. Sup.Ct. (Herrera)*, supra, 134 Cal.App.4th at 377] But, no action lies under PAGA for violating a "posting, notice, agency reporting, or filing requirement" of the Labor Code *except mandatory payroll or workplace injury* reporting. [Lab.C. § 2699(g)(2)]

An "aggrieved employee" may maintain a civil action to recover civil penalties for Labor Code violations "on behalf of himself or herself *and* other current or former

employees against whom one or more of the alleged violations was committed." [Lab.C. § 2699(g)(1) (emphasis added)] "Aggrieved employee" means anyone who was employed by the alleged violator and against whom one or more of the alleged violations was committed. [Lab.C. § 2699(c)]

Any suit under PAGA is a **representative action**. Plaintiff must sue "on behalf of himself or herself and other current or former employees" injured by the employer's violations. [Lab.C. § 2699(g)(1)] A plaintiff may maintain a representative suit under PAGA *without satisfying class action requirements*. [*Arias v. Sup.Ct. (Angelo Dairy)* (2009) 46 Cal.4th 969, 981-982; see also *Franco v. Arakelian Enterprises, Inc.* (2015) 234 Cal.App.4th 947, 962—PAGA representative action "is not a class action, but rather is a type of qui tam action"]

"Although PAGA actions can serve to *indirectly* enforce certain **wage order** provisions by enforcing *statutes* that require compliance with wage orders …, the PAGA does **not** create any private right of action to *directly* enforce *a wage order.*" [*Thurman v. Bayshore Transit Mgmt., Inc.* (2012) 203 Cal.App.4th 1112, 1132 (emphasis in original) (citing *Bright v. 99 Only Stores* (2010) 189 Cal.App.4th 1472, 1478)—"Only the Legislature, through enactment of a statute, can create a private right of action to directly enforce an administrative regulation, such as a wage order"]

Notice Requirement

A civil action pursuant to Labor Code § 2699 may not be commenced (or a pending action amended to include a § 2699 claim) until the following requirements have been met:

- The aggrieved employee must give written notice by *certified mail* to the employer and by *online filing* with the Labor and Workforce Development Agency ("Agency") specifying the Labor Code provisions violated, "including the facts and theories to support the alleged violation." [Lab.C. § 2699.3(a)(1); *Caliber Bodyworks, Inc. v. Sup.Ct. (Herrera)* (2005) 134 Cal.App.4th 365, 370—notice allows Agency to act first on more serious violations, such as wage and hour violations, and gives employers opportunity to cure less serious violations]

Failure to plead compliance with this prelawsuit notice requirement is *fatal* to claims for civil penalties under Lab.C. § 2699.5. [*Caliber Bodyworks, Inc. v. Sup.Ct. (Herrera)*, supra, 134 Cal.App.4th at 381-382]

- If the Agency does *not* intend to investigate the alleged violation, it must so notify the aggrieved employee and the employer by certified mail within 60 days after the employee's notice was postmarked. The aggrieved employee may file a § 2699 action upon receipt of the Agency's notice; or if the Agency *fails to provide notice*, within *65 days* after the employee's notice was postmarked. [Lab.C. § 2699.3(a)(2)(A) (amended eff. 6/27/16)]

- If the Agency *intends* to investigate the alleged violation, it must so notify the aggrieved employee and the employer within 65 days after the employee's

notice was postmarked. It then has up to 180 days (i.e., 120 days plus an available 60-day extension with the requisite notice) to issue a citation. [Lab.C. § 2699.3(a)(2)(B) (amended eff. 6/27/16)]

Nothing in the statute exempts an aggrieved employee whose complaint **avoids** any reference to the Act or seeks remedies in addition to civil penalties from complying with section 2699.3, subdivision (a). [*Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 371]

Class Actions for UCL Violation

An aggrieved employee may bring a class action under California's Unfair Competition Law (UCL, Bus. & Prof.C. § 17200 et seq.), which requires compliance with the class action prerequisites of CCP § 382 **and limits remedies** to *recovery of unlawfully withheld wages* or other restitution and equitable relief. [*Arias v. Sup.Ct. (Angelo Dairy)* (2009) 46 Cal.4th 969, 980; see *Harris v. Investor's Business Daily, Inc.* (2006) 138 Cal.App.4th 28, 41] Notably, damages may **not** be awarded. See Bus. & Prof. Code § 17203. There is no right to disgorgement of all benefits a defendant may have received from its unlawful practice. [*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163 at 172; see also *Feitelberg v. Credit Suisse First Boston, LLC* (2005) 134 Cal.App.4th 997, 1016—nonrestitutionary disgorgement of profits also not available]

Standing Requirement

The § 17204 requirement that private persons have suffered injury in fact *and* have lost money or property "discloses a clear requirement that injury must be economic, at least in part." [*Animal Legal Defense Fund v. Mendes* (2008) 160 Cal.App.4th 136, 147; see *Peterson v. Cellco Partnership* (2008) 164 Cal.App.4th 1583, 1591-1592—buyers of cell phone insurance suffered no economic injury from seller's unlicensed status (insurance was still enforceable)] The *individual plaintiff* must have "lost money or property as a result of the unfair competition." It is not sufficient that a group to which plaintiff belongs may have sustained such damages. [*Schwartz v. Provident Life & Acc. Ins. Co.* (2013) 216 Cal.App.4th 607, 612]

Pleading Requirements

A complaint under the Unfair Practices Act (B. & P.C. 17000 et seq.) must state facts supporting the **statutory** elements of the alleged **violation**. See *G.H.I.I. v. MTS* (1983) 147 Cal.App.3d 256, 271 and *Khoury v. Maly's of Calif.* (1993) 14 Cal.App.4th 612, 619 [demurrer was properly sustained; complaint identified no particular **statutory** section that was violated and failed to describe with reasonable particularity facts supporting **violation**].

MERITS

First, it should be noted that as Defendant claims, the original Complaint is "boilerplate." Second, the original Complaint is pleaded as though a private right of action exists for **each** alleged violation of the Labor Code. This is incorrect. Any

provision of the Labor Code that provides for civil penalties must be enforced as a PAGA action. [*Villacres v. ABM Industries, Inc.* (2010) 189 Cal.App.4th 562] A PAGA action is not a private action. The real party in interest is the California Labor and Workforce Development Agency. [*Sakkab v. Luxottica Retail North America, Inc*. (9th Cir. 2015) 803 F.3d 425]

Third, Plaintiff has not pleaded compliance with Labor Code § 2699. As stated supra, failure to plead compliance with this prelawsuit notice requirement is *fatal* to claims for civil penalties under Lab.C. § 2699.5. [*Caliber Bodyworks, Inc. v. Sup.Ct. (Herrera)* (2005) 134 Cal.App.4th 365 at 381-382] As stated supra, a plaintiff cannot avoid these requirements by omitting reference to PAGA or seeking remedies in addition to the civil penalties. Id. at 371.

Fourth, a PAGA action is a representative action not a class action. See *Arias v. Sup.Ct. (Angelo Dairy)* (2009) 46 Cal.4th 969, 981-982. While Plaintiff may argue that the tenth cause of action for violation of Bus. & Prof. Code § 17200 et seq. may be brought as a class action, the problem lies in that the Complaint is pleaded as though the alleged violations of the Labor Code is also brought as a class action. See ¶ 12. Indeed, the action is brought on behalf of the Plaintiff and "all other members of the general public..." This is improper. As for the tenth cause of action, it does not directly allege facts that would meet the standing requirement. See *Schwartz v. Provident Life & Acc. Ins. Co., supra.* In addition, no facts are alleged with particularly that support the statutory elements of the violation. See *Khoury v. Maly's of Calif., supra.*

In light of the all the foregoing defects, the entire complaint will be stricken sua sponte pursuant to CCP § 436 with leave to amend. Plaintiff ignores the fact that the maintenance of an action for "wage and hour" violations is somewhat complicated and must be carefully researched. It is not incumbent upon the Court to "make the case" for the Plaintiff. A "kitchen sink" type pleading with virtually no supporting facts and seeking virtually every type of remedy whether there is a legal entitlement thereto or not cannot stand.

Pursuant to California Rules of Court, rule 391(a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: A.M. Simpson on 11/28/16
(Judge's Initials) (Date)